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The Fate of Universalism in Global Insolvency: Neoconservatism and New Horizons

ERIC SOKOL

Abstract

Recent cases in the United States, United Kingdom, and Australia have all signaled that international insolvency law is slowly losing traction to more regional proceedings. This can have huge ramifications for creditors of international companies. The past decade has seen much international progress in business insolvencies; with the previous “territorialist” models of regional dismantling giving way to more “universalist” approaches. New trends in these large jurisdictions may herald the discovery of modified universalism’s breaking point, but not its diminishment nor defeat. This healthy prognosis for modified universalism in the U.S., United Kingdom (U.K.), and Australia is further bolstered by a proliferation of new and exciting universalist tendencies in jurisdictions around the world.

I. Introduction

It has been written that “no aspect of human endeavor is more clearly global than commerce and investment and no part of commercial law has been more in the forefront of international cooperation than the law of insolvency.”¹ Corporate bankruptcy (also sometimes called corporate “insolvency”)² is a method by which debtor companies can keep creditors from enforcing some or all of their claims during a period of reorganization or liquidation.³ Creditors also benefit from a more ordered enforcement of

1. Jay Lawrence Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739, 740 (2015) [hereinafter *Interpretation Internationale*].

2. See, e.g., Sandeep Gopalan & Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*, 48 VAND. J. TRANSNAT’L L. 1225, 1235 (2015); Jay Lawrence Westbrook, *Comity and Choice of Law in Global Insolvencies*, 54 TEX. INT’L L.J. 259, 260 (2019) [hereinafter *Comity and Choice of Law*]. But cf., Soheyla Kefayati & Mehdi Ashouri, *International Bankruptcy with an Emphasis on Trade Bill Approved in 2013*, 10 J. POL. & L. 1, 2 (2017) (stating the Iranian bankruptcy regime is for businessmen and corporations while the insolvency regime is for all others).

3. See, e.g., *Bankruptcy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

claims, which staves off “a creditor race”⁴ that could leave an unwary lender empty-handed. When an ailing company must file for bankruptcy in more than one court system, it is known as a “cross-border insolvency.”⁵ Despite the term’s suggestion, planetary stays of creditor collection are not yet available⁶ and “there is no super-national bankruptcy law.”⁷

Instead of such a global system, corporate bankruptcy law is usually thought of as two competing schools of thought: territorialism and universalism.⁸ These two schools coalesce into a third, known as modified universalism.⁹ Though these three terms have applications outside of bankruptcy law, this Comment will use them exclusively in their bankruptcy context. Territorialism, universalism, and modified universalism will be discussed below in Part I.

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) released its Model Law on Cross-Border Insolvency (Model Law).¹⁰ As of the time of this publishing, the Model Law has been adopted by forty-seven countries on six continents.¹¹ The related UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (Model Enforcement Law) was subsequently released in 2018¹² and is designed to “provide [s]tates with a simple, straightforward and harmonized procedure for recognition and enforcement of insolvency-related

4. Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 50 (2015).

5. E.g., Xenia Kler, *COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application Within Cross-Border Insolvency Cases*, 34 AM. U. INT'L L. REV. 429, 431 (2018).

6. See Jay Lawrence Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 TEX. L. REV. 1473, 1479 (2018) [hereinafter *Global Insolvency Proceedings*].

7. Dawson, *supra* note 4, at 50.

8. See, e.g., Jonathan C. Gordon, *Crossing the Line in Cross-Border Insolvencies*, 27 AM. BANKR. INST. L. REV. 17, 21 (2019).

9. See, e.g., Lia Metreveli, *Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to Its Model Law on Cross-Border Insolvency*, 51 COLUM. J.L. & SOC. PROBS. 315, 316 (2017); Dawson, *supra* note 4, at 53.

10. U.N. Comm'n on Int'l Trade Law, Model Law on Cross-Border Insolvency (May 30, 1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last visited Dec. 15, 2019).

11. U.N. Comm'n on Int'l Trade Law, Overview of the Status of UNCITRAL Conventions and Model Laws (Nov. 15, 2016), <https://www.uncitral.org/pdf/english/TAC/Status/Overview-Status-Table.pdf> (last visited Dec. 15, 2019).

12. U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (July 2, 2018), <https://uncitral.un.org/en/texts/insolvency/modellaw/mlj> (last visited Dec. 15, 2019).

judgments.”¹³ An effort similar to that of UNCITRAL has been undertaken by the Judicial Insolvency Network (JIN). JIN has promulgated the Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (Guidelines).¹⁴ The Guidelines address issues regarding inter-judicial communication,¹⁵ and have gained at least unofficial acceptance in parts of the United States (U.S.), Singapore, Canada, and more.¹⁶ The Model Law, Model Enforcement Law, and JIN Guidelines will be discussed below in Part II.

Even with broad acceptance of the Model Law,¹⁷ as well as the release of the yet-to-be-tested Model Enforcement Law¹⁸ and JIN Guidelines,¹⁹ some scholarly literature has recently argued that universalism no longer seems to be on a trajectory towards global acceptance.²⁰ In the last decade, court decisions in the U.S., U.K., and Australia have been cited as examples of the respective court systems casting off a previous universalist tendency and instead exhibiting characteristics that are distinctly territorialist; including such actions as denying recognition of foreign main proceedings, refusing to enforce judgments from foreign bankruptcy courts, refusing to apply the foreign main proceeding’s substantive law, and other such judicial determinations that generally prefer treatment of local creditors over foreign ones. These cases and arguments will be summarized below in Part III.

In stating universalism as having suffered a major setback, the pessimistic literature too hastily discounts the numerous other proceedings around the world that validate many modified universalist victories. These victories are in large jurisdictions, such as Singapore, India, and Iran, as well

13. *Id.*

14. Judicial Insolvency Network, *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters* (Oct. 11, 2016) <http://www.jin-global.org/jin-guidelines.html> [hereinafter *JIN Guidelines*] (last visited Dec. 15, 2019).

15. See generally, Paul H. Zumbro & Omid H. Nasab, *Two Is Company, but Three Is a (Better) Crowd: The Southern District of New York Joins Delaware and Singapore in Adopting Cross-Border Insolvency Guidelines*, 11 *INSOLVENCY & RESTRUCTURING INT’L* 21 (2017).

16. *JIN Guidelines*, *supra* note 14.

17. See, e.g., John A. E. Pottow, *The Dialogic Aspect of Soft Law in International Insolvency: Discord, Digression, and Development*, 40 *MICH. J. INT’L L.* 479, 484 (2019) (“Moreover, the adoption rate of the [Model Law] rate of adoption has been . . . relatively impressive in terms of its breadth.”).

18. See Varoon Sachdev, *Choice of Law in Insolvency Proceedings: How English Courts’ Continued Reliance on the Gibbs Principle Threatens Universalism*, 93 *AM. BANKR. L.J.* 343, 349 (2019).

19. E.g., *JIN Guidelines*, *supra* note 14.

20. See Adrian Walters, *Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law*, 93 *AM. BANKR. L.J.* 47, 78 (2019) (“The divergence between the [U.S. and U.K.] systems . . . present[s] challenges for universalism’s harmonization agenda.”).

as some smaller countries also herein addressed. The victories reflect large systemic shifts in each mentioned jurisdiction. These shifts toward universalism are discussed below in Part IV.

Part V is a brief survey of continued territorialism in certain jurisdictions. Though not explored in-depth in this Comment, this author notes it can also be argued that a lack of positive universalist strides is itself a victory for the otherwise natural state of territorialism.

This Comment argues that the recent global universalist victories vastly overshadow the slight setbacks the theory's application has experienced in U.S., U.K., and Australian law that are arguably territorialist and reflect conservative lack of international comity. Taken as a whole, this Comment stands for the proposition that the world is moving ever closer to a unified playing field for international corporate creditors and debtors alike.

II. Territorialism, Universalism, and Modified Universalism

The argument between territorialism and universalism has been described as “a long-standing scholarly debate”²¹ between what is essentially “two broad extreme dichotomies.”²² Both of these two extremes find temperance in a middle ground known as modified universalism. The current opinion in legal scholarly writing is that “[m]odified universalism still seems to be where ‘it’s at’”²³ This statement has been refuted by those that point to recent decisions in the U.S. that could “render global management of a global insolvency nearly impossible,”²⁴ and decisions in the U.K. that essentially require those “seeking to alter an English law contract” to do so by going to jolly old England themselves.²⁵

Some authors have argued that judicial actions that satisfy local interests should be classified “crudely as ‘territorialist’”²⁶ and the opposite actions as universalist. This thinking has its drawbacks. It can even give professional discussions a moral tinge in regular practice.²⁷ This can be somewhat appropriate, however, because the choice of insolvency system a government elects has drastic impacts for debtors *and* for creditors to entities that operate in that country which may potentially become insolvent in the

21. Fabio Weinberg Crocco, *When Deference Makes a Difference: The Role of U.S. Courts in Cross-Border Bankruptcies*, 28 NORTON J. BANKR. L. & PRAC. (2019).

22. Gerard McCormack & Wan Wai Yee, *The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms?*, 54 TEX. INT'L L.J. 273, 276 (2019).

23. Ian G. Williams & Adrian J. Walters, *Modified Universalism in Our Time? A Look at Two Recent Cases in the U.S. and U.K.*, 37 AM. BANKR. INST. J., 24, 52 (2018).

24. *Comity and Choice of Law*, *supra* note 2, at 262.

25. *Comity and Choice of Law*, *supra* note 2, at 270.

26. Walters, *supra* note 20, at 71.

27. *Id.*

future. To better understand these issues, it will be helpful to understand the concepts of territorialism, universalism, and modified universalism.

A. Territorialism

Territorialism is sometimes known as the “grab rule”²⁸ and is a bankruptcy scheme in which each jurisdiction requires its own bankruptcy proceeding over the entirety of the assets that the debtor has located in that jurisdiction.²⁹ The necessity of many different proceedings leads to many inefficiencies in the process.³⁰

Some of the main problems that present themselves in a territorialist regime are: increased costs, “disparate treatment of similar creditors,” and a high level of necessary creditor cooperation.³¹ Because of these difficulties, creditors without a local presence can have a more difficult task collecting in a jurisdiction remote to them.

These disadvantages are moderately offset by the advantages of simplicity, predictability, clarity, and avoidance.³² It must be noted that these advantages of territorialism are only true when viewed through the eyes of the *local* creditor.³³ Recent literature suggests that maintaining a territorialist attitude may also benefit local bankruptcy practitioners.³⁴

B. Universalism

Universalism can be thought of as a system in which bankruptcies involve “unified global proceedings, administered by one principal court under a single governing law, but potentially with the assistance of courts in other jurisdictions. Assets located in ‘secondary jurisdictions’ are either transferred to the main one or simply subject to the same bankruptcy regime”³⁵ The area in which the main bankruptcy proceeding takes place in universalism is often referred to as the entity’s center of main interests

28. E.g., Gopalan et al., *supra* note 2, at 1267; *Comity and Choice of Law*, *supra* note 2, at 263.

29. See, e.g., Crocco, *supra* note 21; Dawson, *supra* note 4, at 52; Metreveli, *supra* note 9, at 320.

30. See Gopalan et al., *supra* note 2, at 1228.

31. Metreveli, *supra* note 9, at 320-21.

32. See Metreveli, *supra* note 9, at 320.

33. See Metreveli, *supra* note 9, at 316.

34. See Williams et al., *supra* note 23, at 25 (“Maintaining the territorialist proposition . . . could turn out to be an important focus for professionals on both sides of the pond.”).

35. Crocco, *supra* note 21 (footnotes omitted).

(COMI).³⁶ In pure universalism, the COMI court would be in charge of the entirety of the bankruptcy on a “worldwide basis.”³⁷

One of the big criticisms of universalism is there is no way for it to be instituted without either “a comprehensive insolvency convention or global courts and centralized enforcement mechanisms.”³⁸ This leads some to conclude that universalism “is detached from reality”³⁹ and that a global legal regime replacing a nation’s own may be too big an issue for some countries.⁴⁰ Also, COMI disputes can arguably lead to forum shopping among the different jurisdictions by a company moving its assets in anticipation of filing soon after in the relocation jurisdiction.⁴¹

Despite these criticisms, “[m]ovement towards the internationalization of private international law has been apparent from some time . . .”⁴² and “[t]he majority of scholars agree that, at least in theory, universalism is the most efficient approach to dealing with international insolvencies.”⁴³

The advantages of universalism include eliminating costs by only having one set of proceedings, minimizing “disparate treatment of creditors” from inside and outside the COMI jurisdiction, facilitating information sharing, and helping enable reorganizations.⁴⁴ While any actual practicing form of pure universalism is not yet apparent, proponents have yet to be proven wrong in their assertion that “[o]nly in a single proceeding can all assets be assembled to be sold or recapitalized free of prior claims and value allocated fairly to all stakeholders.”⁴⁵

C. Modified Universalism

Modified universalism is a combination of both territorialism and universalism,⁴⁶ that involves a main proceeding in the entity’s COMI as well as each participating nation’s ability to determine whether or not to “defer to the law applicable in the main proceeding” in certain instances.⁴⁷ This added

36. See, e.g., Gopalan et al., *supra* note 2, at 1267; Metreveli, *supra* note 9, at 321.

37. TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES, PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES § II.A (AM. LAW INST. 2003).

38. Walters, *supra* note 20, at 49.

39. Dawson, *supra* note 4, at 51.

40. See Gopalan et al., *supra* note 2, at 1269; Metreveli, *supra* note 9, at 321.

41. See Metreveli, *supra* note 9, at 321.

42. Irit Mevorach, *Modified Universalism as Customary International Law*, 96 TEX. L. REV. 1403, 1421 (2018).

43. Crocco, *supra* note 21.

44. Metreveli, *supra* note 9, at 321.

45. *Global Insolvency Proceedings*, *supra* note 6, at 1476.

46. See, e.g., Metreveli, *supra* note 9, at 316.

47. Walters, *supra* note 20, at 63; accord Dawson, *supra* note 4, at 53.

“flexibility”⁴⁸ comes with the caveat that it is still possible for “the laws of the jurisdiction where the main proceeding is taking place [to] produce extraterritorial effects”⁴⁹

Modified universalism’s current manifestation also utilizes agents known as foreign representatives to represent the main bankruptcy proceeding at ancillary ones.⁵⁰ These representatives use the ancillary court for requests relating to discovery and injunctions,⁵¹ actions to stop (or “avoid”) the collection of secured assets,⁵² and more.

Criticisms of modified universalism include the idea that modernized states benefit from it more than burgeoning states do,⁵³ in that it might (among other things) frustrate local creditors’ expectations. This is possible, in part, due to the nonexistence of any international common law jurisprudence regarding modified universalism, or natural modes to enforce international insolvency.⁵⁴ It is likely that local and foreign creditor’s expectations would be more likely to be aligned if an international common law regarding cross-border insolvency were to be acknowledged in the future.

Another criticism of modified universalism is that it assumes that it is the job of countries to reduce transactional friction, when this might not be the overall ethos of the people of that state.⁵⁵ As stated above, states each make careful and unique calculations about how they want to balance creditor rights with debtor ones.⁵⁶ It is not given that an international insolvency regime is something a state is prepared for, or wants.

If true universalism is a process of moving away from the natural inclination towards territorialism, it seems that most jurisdictions in our global world find themselves currently operating in the middle ground of modified universalism. That said, “the status of modified universalism is somewhat amorphous”⁵⁷

48. Gopalan et al., *supra* note 1, at 1231.

49. Crocco, *supra* note 21.

50. See, e.g., Metreveli, *supra* note 9, at 323.

51. See *id.*

52. See, e.g., Gopalan et al., *supra* note 2, at 1264 (“Eurofinance . . . were “hit with ‘adversary proceedings’ in order to avoid and recover payments made to them.”); *Lien Avoidance*, BLACK’S LAW DICTIONARY (11th ed. 2019).

53. See Dawson, *supra* note 4, at 58; Walters, *supra* note 20, at 61-62.

54. See Mevorach, *supra* note 42, at 1416.

55. See Walters, *supra* note 20, at 61.

56. See, e.g., Jessica Nowak, *The Power Struggle: Shareholder Rights in Brazilian Corporate Bankruptcy*, 25 U. MIAMI INT’L & COMP. L. REV. 339, 348 (2018).

57. Mevorach, *supra* note 42, at 1404-05.

III. Model Law, Model Enforcement Law, and JIN Guidelines

Three of the current systems trying to make order out of this amorphism are the Model Law, Model Enforcement Law, and the JIN Guidelines. While this paper does not cover the intricacies of these three rule sets, a basic understanding of them will help underscore their application in modern modified and pure universalism theory.

A. Model Law

The Model Law is widely agreed to be an instrument of modified universalism.⁵⁸ The Model Law includes provisions intended to provide “[a]ccess, [r]ecognition, [r]elief, and [sic] [c]ooperation and [c]oordination.”⁵⁹ These cross-border “soft law[s]”⁶⁰ are the mechanism by which foreign representatives can get a foreign main proceeding recognized, obtain domestic stays on collections, and possibly obtain “discretionary relief for both main and non-main proceedings post-recognition.”⁶¹

It has been written that “the Model Law facilitates the optimal management of cross-border insolvency so as to benefit debtors, creditors, and other stakeholders, as well as the economies in which these stakeholders function.”⁶² The wide adoption of the rules is evidence that this is true.

The Model Law also has received criticisms, including that it does not provide enough “predictability for creditors or debtors in relation to the enforcement of insolvency judgments . . .,”⁶³ it does not properly stress the creditors’ expectations as a criteria for COMI determination,⁶⁴ that the COMI factors are “neither comprehensive nor uniform across U.S. and European Courts[,]”⁶⁵ that the differences in timing used to determine an entity’s COMI can lead to forum shopping,⁶⁶ and the Model Law soft law approach’s slow speed allows for “uncertainty derived from inconsistent application and

58. See, e.g., Walters, *supra* note 20, at 64; McCormack et al., *supra* note 22, at 276; Dawson, *supra* note 4, at 53; Gopalan et al., *supra* note 2, at 1231.

59. Metreveli, *supra* note 9, at 325; accord McCormack et al., *supra* note 22, at 276; Walters, *supra* note 20, at 57-58.

60. McCormack et al., *supra* note 22, at 304; accord Walters, *supra* note 20, at 65. See generally, Pottow, *supra* note 17.

61. Metreveli, *supra* note 9, at 325.

62. McCormack et al., *supra* note 22, at 275.

63. Gopalan et al., *supra* note 2, at 1266.

64. See Kler, *supra* note 5, at 434-35.

65. See Kler, *supra* note 5, at 447.

66. See Metreveli, *supra* note 9, at 321; Kler, *supra* note 5, at 440. But see Crocco, *supra* note 21 (“[E]vidence . . . supports the claim that . . . forum shopping . . . is of limited practical importance.”).

interpretation . . .” in the meantime.⁶⁷ While not herein discussed, it is noteworthy that the European Union’s Insolvency Regulation (EIR)⁶⁸ for internal cross-border cases is very similar to the Model Law, except it addresses the issue of a company’s COMI using creditor’s reasonable expectations by taking into account where business activity occurs instead of just where the entity is incorporated.⁶⁹

B. Model Enforcement

One of the main problems with the Model Law has been addressed in the Model Enforcement Law. “[T]he Model Law does not specifically deal with the enforcement of judgments,”⁷⁰ and “UNCITRAL has recently attempted to respond to this inconsistency by promulgating the [Model Enforcement Law].”⁷¹ The Model Enforcement Law is still very new, but one article published while it was still just an amendment has argued it could introduce “more stability into the world of international insolvency by narrowing the range of judicial discretion and enumerating finite exceptions through which enforcement and recognition can be denied.”⁷²

Two of the main additions in the Model Enforcement Rules are in Article X and Article 14. “Article X provides a mechanism to overturn narrow interpretations of the *Model Law* by stating that the discretionary relief available . . . ‘should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary.’”⁷³ Article 14 offers a list of conditions “where a court *may* deny recognition in Article 14, but the accompanying *Draft Guide to Enactment of the Model [Enforcement] Law* . . . emphasizes that courts” may still honor and enforce things not enumerated.⁷⁴

67. Gopalan et al., *supra* note 2, at 1230.

68. See, e.g., European Commission, *Insolvency proceedings*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en (last visited Dec. 15, 2019).

69. See Kler, *supra* note 5, at 434-35.

70. Gopalan et al., *supra* note 2, at 1233.

71. Sachdev, *supra* note 18, at 349.

72. Metreveli, *supra* note 9, at 345.

73. Sachdev, *supra* note 18, at 372 (quoting MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS ART. X (U.N. Comm’n on Int’l Trade Law 2018)).

74. Sachdev, *supra* note 18, at 372.

C. JIN

Among other things, JIN facilitates “the establishment of personal relationships among commercial judges from different countries.”⁷⁵ The JIN Guidelines do not directly compete with the UNCITRAL laws, but instead “provide for the incorporation of protocols into court orders when there are parallel proceedings affecting a debtor company or group.”⁷⁶ The Guidelines offer “the possibility of innovative practices such as joint hearings”⁷⁷ and their “drafters were focused primarily on the ability of the parties to be present during any communication between courts on substantive matters”⁷⁸ The Guidelines separate communication between courts that requires the presence of parties from that which was more procedural⁷⁹ and their accompanying documentation gives suggestions about recording and preserving hearings.⁸⁰

In February 2017, the Guidelines were implemented by Singapore,⁸¹ were instituted as local rules in Delaware, and were also adopted in the Southern District of New York.⁸² Further, “[t]he Chancery Division of the High Court of England [and] Wales adopted the Guidelines on [May 5,] 2017.”⁸³ At a recent roundtable it was also stated that, in Ontario, “there was a notice sent out to the insolvency community saying the court is expecting to see these new [JIN G]uidelines used.”⁸⁴

IV. Universalism’s Mixed Success in Key JXs

Even with the aforementioned three cross-border insolvency resources, much “has been inconsistent and unpredictable” about cross-border

75. *Global Insolvency Proceedings*, *supra* note 6, at 1492-93.

76. Walters, *supra* note 20, at 109.

77. *Id.*

78. Zumbro et al., *supra* note 15, at 22.

79. *See id.*

80. Zumbro et al., *supra* note 15, at 22-23.

81. Press Release, Supreme Court of Singapore, Paving the Way for Improved Coordination of Cross-Border Insolvency Proceedings: Adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (Feb. 1 2017) (on file with author).

82. *See* Zumbro et al., *supra* note 15, at 21.

83. Press Release, Supreme Court of Singapore, England and Wales—The latest to adopt the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (May 11, 2017) (on file with author).

84. Ameneh Bordi, Scott Cousins, Andrea Hartley, Natalie Levine & James R. Risener III, *Corporate Bankruptcy Panel Chapter 15 Choice of Law: How Far Do I Need to Go to Get My Money Back?*, 35 EMORY BANKR. DEV. J. 345, 360 (2019).

insolvency enforcement; even in states that have adopted the Model Law.⁸⁵ It was recently stated:

[A] judge in New York must assume that a Chapter 11 confirmed at Battery Park will fail to discharge any English-law contract obligations in England, while a judge on Fetter Lane in London would logically expect a substantial risk of the same in the United States as to a contract governed by New York law.⁸⁶

One possible general reason for these issues arising is that countries can have very different “broad political outlook[s]” than one another.⁸⁷ For this reason, it is necessary to look to specific examples from key Model Law states to better understand the current state of affairs.

A. United States

It has been said that “[t]he liberal fresh start for individuals in U.S. bankruptcy law is ‘peculiarly American.’”⁸⁸ Further, “[t]he United States courts developed a strong cooperative jurisprudence through the quarter century or so before [adopting] the Model Law.”⁸⁹ The Model Law’s American manifestation was codified in 2005 as Chapter 15 of the Bankruptcy Code.⁹⁰ Currently, Chapter 15 is “the governing statutory scheme for U.S. cases ancillary to foreign [main] proceedings”⁹¹ and is today’s “sole gateway for a U[.]S[.] court to provide assistance to a foreign court; there is no residual common law discretion.”⁹² Also, “[t]he judicial code [of the U.S.] limits the bankruptcy judge’s authority to enter final judgments” to certain matters (known as “core” matters), unless both the parties grant their consent.⁹³

85. Metreveli, *supra* note 9, at 327.

86. *Comity and Choice of Law*, *supra* note 2, at 262.

87. McCormack et al., *supra* note 22, at 287.

88. Iain Ramsay, *U.S. Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law*, 87 TEMP. L. REV. 947, 947 (2015) (quoting MONICA PRASAD, *THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY* 183 (2012)).

89. *Interpretation Internationale*, *supra* note 1, at 741.

90. See, e.g., Michael J. Venditto, *The “Border Wall” in Chapter 15: Does § 1506 Prevent Foreign Law from Crossing the Border?*, AM. BANKR. INST. J., Oct. 2017, at 22; Hardy DeLaughter, *Why Two Facets of Chapter 15 Rulings Hinder Cross-Border Insolvency Petitions in the United States*, 32 EMORY BANKR. DEV. J. 397, 402 (2016).

91. Alec P. Ostrow, *Has Chapter 15 Bestowed on the Bankruptcy Court a Roving Commission to Do Equity After a Foreign Proceeding Has Been Recognized?*, 2019 NORTON ANN. SURV. OF BANKR. L. (2019).

92. McCormack et al., *supra* note 22, at 291.

93. Martin E. Beeler, *Recent Developments in Bankruptcy Jurisdiction*, 2018 NORTON ANN. SURV. OF BANKR. L. (2018).

The natural inclination would be to assume that the U.S. has been on a continuous trajectory towards more expansive universalism, but this is far from the case. Recent U.S. case law suggests to many that “the U.S. courts have interpreted Chapter 15 in ways that are inconsistent with the workings and purposes of the Model Law,”⁹⁴ or at least aspects of their application can be “a bit skewed”⁹⁵ and “present old situations with new complications.”⁹⁶ Other authors have argued that these recent cases, discussed below, “do not deviate from the prevailing American view” that international concessions are to be made whenever possible⁹⁷ and that denials happen only in a minority of cases.⁹⁸

There appears to be four main issues that have come up in the last decade regarding U.S. courts and Chapter 15: issues with defining appropriate relief, issues with deciding when and how to determine a company’s COMI, issues with when to utilize the public policy exception to recognition, and issues with the granting of non-debtor releases.

The first issue, U.S. interpretation of the term appropriate relief, has been criticized as having “a lack of definitive standards . . .”⁹⁹ that allows judges to decide whether or not the edict of a foreign court comports with the fairness necessary to be honored domestically.¹⁰⁰ “Chapter 15 allots automatic relief through 11 U.S.C. § 1520.5. Additionally, § 1521 grants a bankruptcy court discretion to provide supplementary relief that may be necessary to protect a debtor or its creditors.”¹⁰¹ The appropriate discretionary relief has been criticized as being “one-sided, as it can only be granted at the request of the foreign representative.”¹⁰² That said, current literature has argued that courts have recently “ruled that the authority granted under the ‘appropriate relief’ provision is broad and thus available to override domestic legal doctrines . . .”¹⁰³ This arguably implies discretion for a future court to grant requests made by those other than a foreign representative.

94. Dawson, *supra* note 4, at 47; accord Metreveli, *supra* note 9, at 336.

95. Alec P. Ostrow, *Situation Comity: Something Familiar, Something Peculiar, Nothing That’s Formal, Nothing That’s Normal*, 2018 NORTON ANN. SURV. OF BANKR. L. (2018).

96. *Id.*

97. Walters, *supra* note 20, at 90.

98. See Crocco, *supra* note 21 (“Empirical evidence suggests that U.S. bankruptcy courts are generally cooperative and, in the vast majority of cases, grant both recognition petitions and motions for discretionary relief.”).

99. Venditto, *supra* note 90, at 76.

100. *See id.*

101. DeLaughter, *supra* note 90, at 398 (footnote omitted).

102. Patricia B. Tomasco & Sara C. Clark, *Heads I Win, Tails You Lose: Asymmetric Discovery in Chapter 15*, AM. BANKR. INST. J., Sept. 2019, at 27 (emphasis omitted).

103. Ostrow, *supra* note 91 (footnote omitted).

The next issue, deciding when and how to determine a company's COMI, has yet to be addressed in U.S. statutes.¹⁰⁴ This is an issue because a determination that an order is *not* from a debtor's COMI can "significantly limit the scope of discovery that a foreign representative can seek . . ."¹⁰⁵ There have been large discrepancies in how differing jurisdictions in the U.S. have dealt with this lack of insight.¹⁰⁶ However, it has recently been stated that "in the vast majority of cases, courts found that the foreign proceeding was pending in the jurisdiction where the debtor had its COMI."¹⁰⁷ When combined "with the high rate of recognitions of foreign proceedings, [this] supports the claim that concerns about forum shopping and manipulation of COMI, although relevant, is [sic] of limited practical importance."¹⁰⁸

Another issue is the criteria for use of the public policy exception, which "authorizes the court to refuse to take action under Chapter 15 if it would be 'manifestly contrary to the public policy of the United States.'"¹⁰⁹ In theory, "the public policy exception [should] be used narrowly and applied only in 'circumstances where a "fundamental policy" of the United States is threatened.'"¹¹⁰ However, "[d]espite the seemingly compulsory language . . . [the] public policy exception [] seemingly permits the bankruptcy court to deny [] otherwise-mandated recognition."¹¹¹ One author also complained about a U.S. court granting recognition to a case over allegations that the foreign main proceeding was a "predatory corporate raid[]," which should have triggered the public policy exception.¹¹²

The last large U.S. issue regards non-debtor (i.e. third-party) releases. Courts "in the First, Second, Third, Fourth, Seventh, Eighth and Eleventh Circuits" allow non-debtor releases in certain circumstances.¹¹³ "[T]he Fifth, Ninth, Tenth, and the District of Columbia Circuits" have stated that non-

104. See Bordi et al., *supra* note 84, at 347.

105. Tomasco et al., *supra* note 102, at 27.

106. See, e.g., Kler, *supra* note 5, at 438; DeLaughter, *supra* note 90, at 412. See generally Gopalan et al., *supra* note 2, at 1250 (reciting COMI determination factors used in another U.S. case).

107. Crocco, *supra* note 21.

108. *Id.*

109. Gopalan et al., *supra* note 2, at 1250 (quoting 11 U.S.C. § 1506).

110. Metreveli, *supra* note 9, at 336 (quoting Kevin P. Ray, *Ch. 15 and Public Policy Lessons from Jaffe v. Samsung*, LAW 360 (Mar. 21, 2014, 12:36 AM), <http://www.law360.com/articles/520171/ch-15-and-public-policy-lessons-from-jaffe-v-samsung>; accord Ostrow, *supra* note 91).

111. Venditto, *supra* note 90, at 23; accord Metreveli, *supra* note 9, at 336.

112. See D. Farrington Yates, George V. Utlik, Daniel J. Saval & Adam M. Lavine, *Coming to America: Alleged Predatory Corporate Raiding Makes Landfall in the United States through Chapter 15 of the Bankruptcy Code*, 12 INSOLVENCY & RESTRUCTURING INT'L 17, 18 (2018).

113. Beeler, *supra* note 93.

debtor releases are barred.¹¹⁴ The resulting circuit split¹¹⁵ has left things in a state of confusion that the Supreme Court has yet to address.¹¹⁶

One other minor issue is the inability to remove a foreign representative, as it would “likely lead to dismissal” and is “a draconian sanction that courts have cautioned against.”¹¹⁷ Also, fining the foreign representative would be similarly punitive on a debtor who “has agreed to some kind of indemnification[.]”¹¹⁸ Ergo, any punishment is likely to be unfairly passed on.

These issues have come up in a number of different U.S. cases. In this author’s opinion, the relevant literature of the 2010’s U.S. can be divided in three main eras: the first with movement towards universalism, the next with a contraction towards territorialism, and the third with signs of a reversal towards a more universalist outlook.

At the beginning of the decade, the literature states cases like *In re Metcalfe & Mansfield Alternative Investment (Metcalfe)*¹¹⁹ seemed to herald signs of continued or even increased deference to foreign main proceedings.¹²⁰ In *Metcalfe*, the U.S. court chose to honor a Canadian foreign main proceeding’s restructuring plan. The plan resulted in different outcomes for U.S. creditors,¹²¹ however the court decided that the public policy exception in Chapter 15 was not applicable due to the use of similar insolvency methods.¹²²

The first case indicating the U.S. territorialist turn was *In re Vitro S.A.B. de CV*,¹²³ which involved a “hotly contested plan from the one voting class of creditors . . . achieved through the counting of votes from ‘insiders’ (i.e., 50 percent of all voting claims were held by intercompany debtholders) . . .”¹²⁴ The court decided that, at least in this instance, “non-debtor discharges were generally unavailable” to those in the U.S., and were not

114. *In re Avanti Commc’ns. Grp. PLC*, 582 B.R. 603, 606 (Bankr. S.D.N.Y. 2018).

115. See, e.g., Gerald C. Bender, Giorgio Bovenzi & Oscar N. Pinkas, *Scheme of Arrangement Confirming Nonconsensual Third-Party Releases Approved in Chapter 15s*, AM. BANKR. INST. J., Dec. 2018, at 34; Pierce G. Hand, IV, *The Eleventh Circuit’s Second Shot at Getting It Right: Nonconsensual Nondebtor Releases in Bankruptcy Court*, 15 DEPAUL BUS. & COM. L.J. 107, 108 (2017).

116. Hand, *supra* note 115, at 108.

117. Gordon, *supra* note 8, at 38.

118. Gordon, *supra* note 8, at 39.

119. *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

120. See, e.g., Metreveli, *supra* note 9, at 336-37 (stating a New York court cited to principles of comity and “modified universalism” in its decision to enforce a foreign restructuring plan).

121. See Metreveli, *supra* note 9, at 336-37.

122. See Gopalan et al., *supra* note 2, at 1255-56.

123. *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012).

124. Bender et al., *supra* note 115, at 35.

“appropriate relief.”¹²⁵ This is arguably an “expansive interpretation” of the public policy exception.¹²⁶ That stated, most of the current literature argues that the case was an exception borne out of the impropriety of the approved voting plan.¹²⁷

A second case that reinforced the return of territorialism was *Jaffé v. Samsung Electronics*.¹²⁸ Therein, the court “held that granting [a] German liquidator’s request to terminate U.S. patent licenses would slow the pace of innovation and undermine the U.S. economy . . .” and was therefore against public policy.¹²⁹ The appeals court subsequently affirmed on the different grounds of insufficient protection for local interests.¹³⁰ There is some argument that this was, again, an exception to the usual comity displayed by the U.S. at the time.¹³¹

Two 2017 cases, *In re Arcapita Bank B.S.C. (Arcapita)*¹³² and *In re SunEdison, Inc. (SunEdison)*,¹³³ both have territorialist aspects. In *Arcapita*, the court decided to keep funds transferred “between New York banks, [even though] the defendants made the placement investments at issue overseas[] in London or Bahrain[,]”¹³⁴ and that doing so was “to the exclusion of [the parties’] legitimate expectations in the circumstances of an insolvency of a Bahraini entity with whom the relevant contracts were made under Bahraini law.”¹³⁵ The second 2017 case, *SunEdison*, resulted in the court holding an “*ipso facto* clause gave the U.S. debtor the right to terminate the contract and reclaim [an intellectual property] grant despite the provision of Korean bankruptcy law that made such a clause unenforceable against the Korean debtor.”¹³⁶ These two cases arguably point to a territorialist contraction in U.S. case law.

125. Gopalan et al., *supra* note 2, at 1259.

126. Metreveli, *supra* note 9, at 340.

127. See Bender et al., *supra* note 115, at 35; see also Walters, *supra* note 20, at 90 (“*Vitro* do[es] not significantly deviate from the prevailing American view that comity is the animating norm . . .”).

128. *Jaffé v. Samsung Elecs.*, 737 F.3d 14 (4th Cir. 2013).

129. Metreveli, *supra* note 9, at 338.

130. See Metreveli, *supra* note 9, at 338-39; Gopalan et al., *supra* note 2, at 1256.

131. See Walters, *supra* note 20, at 90.

132. *In re Arcapita Bank B.S.C.*, 575 B.R. 229 (Bankr. S.D.N.Y. 2017).

133. *In re SunEdison, Inc.*, 577 B.R. 120 (Bankr. S.D.N.Y. 2017).

134. Ostrow, *supra* note 95; accord Richard J. Mason & Karyn D. Heavenrich, *More Mixed Signals on the Extraterritorial Reach of US Avoiding Powers*, 12 INSOLVENCY & RESTRUCTURING INT’L 10, 12 (2018).

135. Ostrow, *supra* note 95.

136. *Comity and Choice of Law*, *supra* note 2, at 261; see also Williams et al., *supra* note 23, at 25 (“However, a recent case . . . seemed to turn against the tide of U.S. thinking . . .”).

The most recent literature points to a third era beginning. *In re Avanti Communications Group PLC (Avanti)*¹³⁷ has been touted as a good example that universalism is making a U.S. comeback.¹³⁸ There, a U.S. court recognized a U.K. third-party release, and stated “that schemes of arrangements sanctioned under UK [sic] law that provide third-party non-debtor guarantor releases should be recognized and enforced . . . “ provided the underlying voting was fair.¹³⁹ The case was distinguished from *Vitro* “on the basis that the debtor’s scheme had ‘near unanimous support’”¹⁴⁰ In 2018, the Southern District of New York further embraced universalism in *In re B.C.I. Finances Pty [sic] Limited*¹⁴¹ and *In re Agrokor D.D., et. al.*¹⁴² “More than 14 years on, chapter 15 [sic] remains relatively underutilized[,]”¹⁴³ but “U.S. courts have been successful in establishing a pragmatic and effective modified universalist bankruptcy regime.”¹⁴⁴

B. United Kingdom

The U.K. has a very different insolvency history than the U.S. For example, imprisonment for consumer debts was only abolished in the U.K. in 1970.¹⁴⁵ Further, there is some contention about the exact number of insolvency regimes in the U.K.¹⁴⁶ In the U.K. “[e]arly cases after the adoption of the Model Law . . . applied the CBIR [the U.K. adoption of the Model Law] according to modified universalist principles.”¹⁴⁷ First, in *Cambridge Gas Transport Corporation v. Official Committee of Unsecured*

137. *In re Avanti Commc’ns. Grp. PLC*, 582 B.R. 603, 618 (Bankr. S.D.N.Y. 2018).

138. See, e.g., Bender et al., *supra* note 115, at 34 (observing that “hand-wringing” with regard to non-debtor releases would become unnecessary after the *Arcapita* decision).

139. *In re Avanti Commc’ns. Grp. PLC*, 582 B.R. at 618.

140. Crocco, *supra* note 21 (quoting *In re Avanti Commc’ns. Grp. PLC*, 582 B.R. at 618).

141. *In re B.C.I. Fins. Pty [sic] Ltd.*, 583 B.R. 288, 297 (Bankr. S.D.N.Y. 2018) (holding that Australian substantive law would govern the New York case).

142. *In re Agrokor d.d., et al.*, 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018) (honoring third-party debtor releases issued in Croatian foreign main proceeding).

143. Tomasco et al., *supra* note 102, at 26; see also Crocco, *supra* note 21 (“[D]ata suggests that there has not been constant or meaningful growth in the rate of Chapter 15 filings in the United States.”).

144. Crocco, *supra* note 21.

145. See Ramsay, *supra* note 88, at 966.

146. See, e.g., Walters, *supra* note 20, at 79-80 (“Indeed, U.K. cross-border insolvency law is better thought of as being like a building with four rooms”); Gopalan et al., *supra* note 2, at 1259 (“The United Kingdom has six potential legal regimes that operate in cross-border insolvency situations.”); McCormack et al., *supra* note 22, at 291 (“[T]here are three statutory vehicles for international/cross-border cooperation in [U.K.] insolvency matters”).

147. Metreveli, *supra* note 9, at 327-28.

Creditors of Navigator Holdings, PLC (Cambridge Gas),¹⁴⁸ the court held that it could honor an Isle of Man bankruptcy plan “under its common law powers of assistance . . .”¹⁴⁹ and that “fairness requires insolvency proceedings to have universal application.”¹⁵⁰ In *In re HIH Casualty & General Insurance Limited (In re HIH)*,¹⁵¹ it was determined upon appeal that the common law should be included as an option in U.K. cross-border insolvency.¹⁵² It was noted that “[c]reditors’ expectations formed part of the justification for the court’s holding . . .”¹⁵³

This universalist era did not last long. The oft-cited first case of the countertrend was *Rubin v. Eurofinance SA (Rubin)*,¹⁵⁴ wherein the U.K court system “took a severe local turn, explicitly disavowing *Cambridge Gas*” and not honoring a U.S. judgment.¹⁵⁵ *Rubin* has been described as “a turf war about the scope of U.K. cross-border insolvency law as a whole.”¹⁵⁶ The *Rubin* court ultimately refused to honor a third-party judgment because third-parties’ rights are not enumerated in the Model Law nor CBIR¹⁵⁷ and doing so was found to be something that ought be left to the legislature.¹⁵⁸ The court “merely bristled at the idea” of choosing the U.S. approach to similar situations.¹⁵⁹

In the years since *Rubin* there have been a few small victories for universalism,¹⁶⁰ however cases such as *Fibria Celulose S/A v. Pan Ocean Co Ltd (Pan Ocean)*¹⁶¹ and *Bakhshiyeva ex rel. International Bank of Azerbaijan*

148. *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors (of Navigator Holdings PLC and others)* [2006] UKPC 26, [2007] 1 AC 508 (PC) (appeal taken from Isle of Man).

149. Walters, *supra* note 20, at 100.

150. Metreveli, *supra* note 9, at 329.

151. *McGrath v. Riddell (In re HIH Cas. & Gen. Ins. Ltd.)* [2008] UKHL 21 (appeal taken from UK).

152. See Gopalan et al., *supra* note 2, at 1263.

153. Metreveli, *supra* note 9, at 330.

154. *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 (appeal taken from Eng.).

155. *Interpretation Internationale*, *supra* note 1, at 746; see also Metreveli, *supra* note 9, at 331 (“[*Rubin*] diverg[ed] from previous decisions”). But cf. Walters, *supra* note 20, at 102 (“Any suggestion that *Rubin* is an abandonment of modified universalism is overblown.”).

156. Walters, *supra* note 20, at 96.

157. See Sachdev, *supra* note 18, at 359 (quoting *Rubin*, [2012] UKSC 46 at [142]).

158. See Metreveli, *supra* note 9, at 331-32.

159. Pottow, *supra* note 17, at 485.

160. See, e.g., McCormack et al., *supra* note 22, at 289 (“[T]he court may [currently] recognize, under the UK [*sic*] version of the Model Law, Croatian insolvency proceedings . . .”).

161. *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC (Ch) 2124, [2014] Bus LR 1041 (UK).

*v. Sberbank of Russia (I.B.A.)*¹⁶² have proven that territorialism has taken stronger hold in the U.K. than in here stateside. In *Pan Ocean*, the U.K. court solidified that U.K. courts could not grant relief which was not available to domestic English debtors.¹⁶³ In *I.B.A.*, this attitude was again upheld,¹⁶⁴ but the case is currently in the process of appeal.¹⁶⁵ This leaves U.K. insolvency law drifting towards territorialism, as does the recent conservative political victory in the country.¹⁶⁶

C. Australia

Australia is the other large Model Law jurisdiction with moderate coverage in American legal literature. Australia adopted the Model Law in 2008,¹⁶⁷ and the two main cases that have been cited in regards cross-border insolvency are *Ackers v Saad Investment Company Limited (Ackers)*,¹⁶⁸ and *Yu v. STX Pan Ocean Company (Yu)*.¹⁶⁹ In *Ackers*, an Australian tax court decided to keep the amount of tax debt it would have received if counted in a Cayman Island proceeding (that would not have counted it, nor given it anything back).¹⁷⁰ In *Yu*, the Australian court allowed a maritime lienholder to move forward on vessels that were part of a foreign insolvency proceeding.¹⁷¹ Australia's choice to do so has been criticized as being "for the benefit of local creditors . . ."¹⁷² and reflecting "the reluctance of

162. Bakhshiyeva *ex rel.* Int'l Bank of Azerbaijan v. Sberbank of Russia [2018] EWHC (Ch) 59, *aff'd*, [2018] EWCA Civ 2802 (UK).

163. See Walters, *supra* note 20, at 99.

164. See *Comity and Choice of Law*, *supra* note 2, at 270.

165. Sachdev, *supra* note 18, at 375.

166. See generally, Guy Faulconbridge & William James, *Britain speeds towards Brexit as Johnson wins large majority in election*, REUTERS WORLD NEWS, (Dec. 12, 2019, 2:05 PM), <https://www.reuters.com/article/us-britain-election/britain-speeds-towards-brexit-as-johnson-wins-large-majority-in-election-idUSKBN1YG2O5>.

167. Michael Murray & Rosalind Mason, *Model Law on Cross-border Insolvency - Exclusion of Australian Banks*, 20 AUSTL. INSOLVENCY J., no. 4, 2008, at 4, https://www.insol.org/emailer/jan2009_downloads/Australia-UNCITRAL_Model%20Law.pdf (last viewed Dec. 15, 2019).

168. *Ackers v Saad Invs Co Ltd* (2010) 190 FCR 285 (Austl.).

169. *Yu v STX Pan Ocean Co* (2013) 223 FCR 189 (Austl.).

170. See Metreveli, *supra* note 9, at 333-34; see also Gopalan et al., *supra* note 2, at 1243 ("Australia [kept] up to the *pari passu* amount . . . [they] would be entitled to receive as a dividend were [they] entitled to be admitted . . ." (quoting *Akers v Saad Inves Co Ltd*, [2013] FCA 738 [53] (Austl.))).

171. Martin Davies, *Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity*, 66 AM. J. COMP. L. 101, 112 (2018).

172. Metreveli, *supra* note 9, at 335.

Australian courts to apply modified universalist principles”¹⁷³ Territorialism would seem to be winning “Down Under.”

V. Universalist Success in Other Jurisdictions

Despite the successes of territorialism (or failures of universalism), especially in the U.K. and Australia, the world has many other jurisdictions that are opening their borders to more expansive creditors’ rights regimes and options. Some are even taking their *first ever* international insolvency steps. It cannot be overstated how drastic a change this can entail for a state.

A. Singapore

Singapore adopted the JIN Guidelines in 2017.¹⁷⁴ It also adopted the Model Law the same year,¹⁷⁵ and it has stated officially that one of the reasons for adoption was to “influence foreign investment in Singapore favorably.”¹⁷⁶ The previous year, Singapore courts made pro-universalist decisions in both *Re Opti-Medix Ltd (Opti-Medix)*¹⁷⁷ and *Re Gulf Pacific Shipping Ltd (Gulf Pacific)*.¹⁷⁸ In *Opti-Medix*, the Singaporean court “focused on COMI-type factors for choosing a central court rather than the old incorporation doctrine.”¹⁷⁹ This aligns them with the arguably more-refined EIR mode of cross-border insolvency. In *Gulf Pacific*, Singapore “recognize[d] the appointment of liquidators over [the] Hong Kong shipping company . . . despite being in out-of-court proceedings regarding which the domestic powers of assistance were constrained.”¹⁸⁰ Singapore appears to be becoming a vanguard of universalism.

173. *Id.*

174. Press Release, Supreme Court of Singapore, Paving the Way for Improved Coordination of Cross-Border Insolvency Proceedings: Adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (Feb. 1, 2017) (on file with author).

175. Press Release, United Nations Information Services (UNIS) Vienna, Singapore enacts legislation implementing UNCITRAL Model Law on Cross-Border Insolvency (Mar. 16, 2017) (on file with author).

176. McCormack et al., *supra* note 22, at 282 (quoting INSOLVENCY LAW REVIEW COMMITTEE, MINISTRY OF LAW, LAW REVIEW COMMITTEE: FINAL REPORT (Sing. 2013), <https://www.mlaw.gov.sg/files/news/announcements/2013/10/ReportoftheInsolvencyLawReviewCommittee.pdf>).

177. *Re Opti-Medix Ltd.* [2016] SGHC 108 (Sing.).

178. *Re Gulf Pac. Shipping Ltd.* [2016] SGHC 287 (Sing.).

179. *Global Insolvency Proceedings*, *supra* note 6, at 1482-83 (footnote omitted).

180. Mevorach, *supra* note 42, at 1433 (footnote omitted).

B. India

In May of 2016, India passed “an overhaul of the insolvency and bankruptcy scheme.”¹⁸¹ The new rules shift the process “away from a debtor-in-possession model, to a model where creditors decide on the resolution while an impartial professional” is put in charge.¹⁸² The new law will also hopefully allow unsecured creditors better legal avenues.¹⁸³ While “[t]he Supreme Court . . . has hailed the Code to be a ‘creditor-friendly’ law[,]”¹⁸⁴ there have been complaints that the new laws are *too* creditor-friendly.¹⁸⁵ Also, “the Ministry of Corporate Affairs, on June 20, 2018[,] issued a public notice . . . inviting comments and suggestions on the draft chapter on cross border [sic] insolvency it plans to introduce . . . based on the [UNCITRAL] Model Law on Cross Border Insolvency.”¹⁸⁶ However, it has been otherwise argued that India has “remained resistant” to the Model Law,¹⁸⁷ ergo, universalism.

C. Other Jurisdictions

In 2013, Iran approved a trade bill that refers “explicitly and extensively to international bankruptcy.”¹⁸⁸ The bill purportedly addresses creditor accessibility, “recognition of foreign proceedings, . . . judicial cooperation, and simultaneous proceedings.”¹⁸⁹ However, the proceedings are still conducted exclusively using local applicable law¹⁹⁰ or treaties,¹⁹¹ and bankruptcy is punishable by up to six years in prison.¹⁹² This is still good incremental progress.

181. Sreyan Chatterjee, Gausia Shaikh & Bhargavi Zaveri, *An Empirical Analysis of the Early Days of the Insolvency and Bankruptcy Code, 2016*, 30 NAT'L L. SCH. INDIA REV. 89, 89 (2018).

182. *Id.* at 90.

183. *See id.* at 97.

184. Sahil Kanuga & Arjun Gupta, *Guarantors under Bankruptcy Code: The Curious Case of Confusing Precedents*, 12 INSOLVENCY & RESTRUCTURING INT'L 19, 23 (2018).

185. *See generally* Navin K. Pahwa, *Corporate Insolvency: Its Operations and Emerging Problems*, 30 NAT'L L. SCH. INDIA REV. 111, 118 (2018).

186. Ran Chakrabarti, *Key Issues in Cross-Border Insolvency*, 30 NAT'L L. SCH. INDIA REV. 119, 121 (2018).

187. McCormack et al., *supra* note 22, at 274.

188. Kefayati et al., *supra* note 2, at 1.

189. *Id.*

190. *See* Kefayati et al., *supra* note 2, at 6.

191. *See* Kefayati et al., *supra* note 2, at 4.

192. TA'ZIR [DETERRING PUNISHMENTS, BOOK FIVE OF ISLAMIC PENAL CODE] Tehran 1996, arts. 670-71 (Iran).

In 2016, the Bahamas published new legislation “allow[ing] court-appointed representatives to be recognized” by a list of 142 countries.¹⁹³ The Bahamas still will not honor orders regarding secured creditors, and also retains the right to utilize a public policy exception.¹⁹⁴ Here, the unsecured creditors will benefit more from the added universalism traits.

Mexico decided to address issues such as the voting abuse in *Vitro*, discussed above, by a reformation of its “*Ley de Concursos Mercantiles* [bankruptcy laws] in 2014 in an attempt to further modernize its bankruptcy proceedings.”¹⁹⁵ Mexico’s previous cross-border insolvency regime has been referred to as “an almost medieval system that strongly favoured [sic] the family owners of companies.”¹⁹⁶ The two main issues that have been noted in the new system are that creditors can opt out of reorganization plans with which they disagree,¹⁹⁷ and reorganizations are made more difficult by the automatic switch to a liquidation proceeding after one year.¹⁹⁸ The new system is still progress and an acknowledgement that change was (and likely still is) needed.

The United Arab Emirates promulgated a new bankruptcy law in 2016 which, among other things, repeals the criminal laws regarding bankruptcy.¹⁹⁹ One article states that the country enacted the law in hopes it will have a “positive impact on the UAE as a conducive financial market for international investors.”²⁰⁰ Under the new regime managers trade risk of imprisonment for joint liability, which the article’s author states is hoped to discourage the previous method of liability avoidance; to “opt for absconding from UAE.”²⁰¹ International soft law instruments like the Model Law have likely influenced universalist shifts, such as this new regime.

A recent article states that Saudi Arabia has remodeled “its economic endeavors to achieve an investment friendly [sic] atmosphere.”²⁰² The system now allows for creditor-initiated restructuring and involves the

193. Sophia Rolle-Kapousouzoglou, *The Bahamas Designates a List of 142 Relevant Foreign Countries for Judicial Cooperation in Cross-Border Insolvency Proceedings*, 11 *INSOLVENCY & RESTRUCTURING INT’L* 39, 39 (2017) (footnote omitted).

194. *Id.* at 40.

195. Richard J. Cooper, Adam Brenneman & Jessica E. McBride, *A New World for LatAm Creditors: Insolvency Reform in Latin America*, 11 *PRATT’S J. BANKR. L.* 190, 193 (2015).

196. Joy Gallup, Mike Fitzgerald & Rodrigo Guaido Azar, *A Step Backwards*, 35 *INT’L FIN. L. REV.* 50, 50 (2016).

197. See Cooper et al., *supra* note 195, at 194.

198. Cooper et al., *supra* note 195, at 193.

199. Minal Kaul, *New Bankruptcy Law in the UAE*, 5 *CT. UNCOURT* 5, 5 (2018).

200. *Id.* at 7.

201. *Id.* at 5.

202. George S K, *Bankrupting Financial Stress: New Bankruptcy Law of Saudi Arabia*, 5 *CT. UNCOURT* 36, 36 (2018).

appointment of a trustee.²⁰³ One drawback of the system is that it still allows for “imprisonment not more than 5 (five) years and fine not more than SAR 5 million.”²⁰⁴ The inclusion of creditors into the affairs of the debtor is arguably a huge step.

VI. Territorialist Successes in Other Jurisdictions

Despite the positive international strides in the above jurisdictions, there are many other states that have not changed much lately from their fairly territorialist outlooks. For example, in Russia, “[i]t is common for some trustees acting in the interests of the debtors to deliberately try to decrease the price of the assets in order to sell them to an affiliated or a controlling person of the debtor” and so independent experts are arguably necessary.²⁰⁵ Further, “a single corporate bankruptcy may take up several years, make thousands of people redundant and trigger losses worth millions.”²⁰⁶ Also, between 2014 and 2016, Russia added “shareholders, chair of the board, members of the board of directors, chief accountants and beneficiary owners” as control persons that are potentially personally liable for corporate debt.²⁰⁷

“In 2006, China introduced its new Enterprise Bankruptcy Law.”²⁰⁸ The law “expands eligibility for bankruptcy to all corporate debtors[] and recognizes the cross-border effect of some bankruptcy cases.”²⁰⁹ Commentary has stated that the law is “not as comprehensive” regarding recognition of inbound cases.²¹⁰ “To date, recognition decisions by Chinese courts are made mainly on the basis of bilateral judicial assistance treaties[,]”²¹¹ partially because “[t]here is little guidance as to what constitutes satisfaction of the reciprocity [alternative option]”²¹² While

203. *Id.* at 37.

204. *Id.*

205. Sergey Treshchev & Elena Malevich, *Sale of Debtor's Assets within Bankruptcy Proceedings in Russia*, 12 *INSOLVENCY & RESTRUCTURING INT'L* 22, 22 (2018).

206. Alina Mikhailova, Maria Fomicheva, Sergey Treshchev & Elena Malevich, *Bankruptcy Proceedings in Russia: Most Recent Statistics and Related Legal Changes*, 11 *INSOLVENCY & RESTRUCTURING INT'L* 22, 22 (2017).

207. *Id.* at 25.

208. Didi Hu, *Cross-Border Insolvency Regime in China: Finding the Most Pragmatic Interim Solution for Globalized Companies Under Localized Practices*, 92 *AM. BANKR. L.J.* 523, 524 (2018).

209. *Id.* (footnote omitted).

210. McCormack et al., *supra* note 22, at 284.

211. Hu, *supra* note 208, at 533.

212. Hu, *supra* note 208, at 536.

there have not been a lot of Chinese cross-border insolvency cases,²¹³ it is important to note that it “was the first law to make express provision for cross-border insolvency” in China.²¹⁴ That stated, at least one author feels that “for the moment at least, creating a cross-border insolvency framework may not be a high priority in the area of insolvency law in China.”²¹⁵ Therefore, China is arguably exhibiting territorialist aspects through its lack of forward motion.

Yet more surveyed countries lacked similar universalist motion. For example, South Africa adopted the Model Law without enumerating any countries with which to have reciprocity, effectively making it “a dead letter”²¹⁶ Japan adopted the Model Law and has subsequently become one of the only countries that grants pre-recognition stays of collections;²¹⁷ but, Japan is plagued with issues regarding creditors not complying with reorganizations,²¹⁸ debtors not being able to stay in-charge,²¹⁹ and “the business restructuring proceedings . . . [being] structurally designed to require creditors . . . to push uphill.”²²⁰ In South America, “[s]hareholders continue to maintain control of the process in most jurisdictions”²²¹ and “restructurings throughout the region continue to be set against a backdrop of government involvement”²²²

VII. Conclusion

While this Comment cannot address every differing insolvency system in the world, it is apparent that there are many different states in very different parts of the globe that are making positive and steady strides towards modified universalism. The recent setbacks in the U.S. are already on the mend through decisions such as the recent *Arca* case. Both

213. See Stacey Steele, Andrew Godwin, Jin Chun, Han Changyin, Ren Yimin & Chi Weihong, *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law*, 66 AM. J. COMP. L. 669, 671 (2018); Hu, *supra* note 208, at 525.

214. Steele et al., *supra* note 213, at 708.

215. Steele et al., *supra* note 213, at 710.

216. McCormack et al., *supra* note 22, at 286; cf. Mevorach, *supra* note 42, at 1431 (“South Africa . . . has adopted the Model Law but has not given effect to its provisions.”).

217. See Davies, *supra* note 171, at 120.

218. See Hideyuki Sakai, Reagan Grayson-Morison, Kaori Kano, Stacey Steele & Kakuko Suzuki, *Reflections on A Revolution in Japanese Business Restructuring Proceedings: An Insolvency Practitioner’s Perspective of the Early 21st Century and Future of Japanese Insolvency Law*, 92 AM. BANKR. L.J. 387, 404 (2018).

219. *Id.* at 405.

220. *Id.* at 415.

221. Cooper et al., *supra* note 195, at 190.

222. Cooper et al., *supra* note 195, at 191.

Australia and the U.K., however, have exhibited a recent territorialist tendency in their insolvency regimes that does not seem to be yet reversing.

Positive strides in large jurisdictions such as Singapore and India, as well as wealthy ones such as Iran, bespeak a very strong undercurrent of modified universalist ideology slowly making its way around the globe. While never completely identical to another states' version, soft law such as the Model Law has definitely made an impact worldwide.

In the coming years, the effects of the newly released Model Enforcement Law and JIN Guidelines will also likely begin to be observed in modern legal literature. Similarly, the author predicts that these fellow soft law tools will sublimate their suggestions into more hard law instruments and agreements. For the foregoing reasons, it is readily apparent that modified universalism is thriving as the 2010's become the 2020's. This, itself, proves the world moves ever closer to a universalist global insolvency outlook. The future likely holds many new cooperative and innovative restructuring endeavors as the rules of the game continue to solidify and become more ubiquitous.